UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

JOHN PARZIALE,

Plaintiff,

v.

HP, INC,

Defendant.

Case No. 5:19-cv-05363-EJD

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS AND/OR STRIKE

Re: Dkt. No. 25

This putative nation-wide class action suit arises out of Defendant HP Inc.'s ("HP" or "Defendant") implementation of a remote firmware update that allegedly incapacitated Plaintiff John Parziale's ("Plaintiff") HP printers and thirty-three other models of HP printers by preventing the use of certain non-HP ink cartridges in those printers.

On November 13, 2019, Plaintiff filed the First Amended Class Action Complaint (Dkt. No. 19, "FAC"). HP now moves to dismiss the FAC pursuant to Rules 8(a)(2), 9(b), 12(b)(6), and 12(f) of the Federal Rules of Civil Procedure (Dkt. No. 25, "Motion"). The Court took the matter under submission for decision without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons below, Defendant's motion is **GRANTED in part and DENIED in part**.

I. Background

On or around September 12, 2017, Plaintiff purchased an HP Officejet Pro 7740 printer from an Office Depot in Jacksonville, Florida. FAC ¶ 22. On June 6, 2018, Plaintiff purchased another HP Officejet Pro 7740 printer from Amazon.com. *Id.* at ¶ 23. When shopping for a printer, it was important to Plaintiff that the printer be compatible with third-party ink cartridges

and refilled HP ink cartridges because these non-HP cartridges were less expensive than their HP brand counterparts. *Id.* at ¶¶ 25-27. Indeed, Plaintiff repeatedly alleges that he would not have purchased the printers had he known that he would be unable to use non-HP cartridges with the printer. *See, e.g., id.* at ¶¶ 27, 33, 58, 100. Plaintiff did not see any representations by HP that he would only be able to use HP brand cartridges, so Plaintiff bought the HP printers. *Id.* at ¶¶ 25-27. The packaging on the printers Plaintiff bought included the statement: "Please use genuine HP ink cartridges for best results." *Id.* at ¶ 34.

Though Plaintiff did not know it at the time of purchase, certain HP printers are configured to perform automatic updates to the software embedded in the device—known as firmware—without user intervention. *Id.* at ¶ 35. This means that HP can remotely update the firmware in its printers without users' knowledge. *Ibid.* HP's online support page for the Officejet Pro 7740 (the "Support Page") contains a brief description of this remote update ability, which HP calls "dynamic security."[1] *Id.* at ¶ 37. The Support Page states:

> Reminder: Dynamic security enabled printer. This Firmware includes dynamic security measures, which may prevent supplies with non-HP chips or circuitry from working now or in the future.

[1] HP's motion to dismiss attaches a printout of the Support Page as an exhibit. Samplin Decl., Dkt. No. 26-1, Ex. A. While the Court generally does not consider materials outside of the complaint on a motion to dismiss, the Court may consider "documents incorporated into the complaint by reference." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, (2007). A document may properly be incorporated by reference where a party "refers extensively to the document." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018), *cert. denied sub nom. Hagan v. Khoja*, 139 S. Ct. 2615 (2019) (citation omitted). Because the allegations in the FAC quote from and rely on the Support Page, the Court finds that the Support Page was incorporated by reference, and finds it appropriate to consider Exhibit A.

Ibid. The Support Page further states: "HP cannot guarantee the quality or reliability of non-HP cartridges." *Id.* at ¶ 38.

On or around April 12, 2019, HP used dynamic security technology to implement a firmware update that modified the firmware on many models of HP printers, including Plaintiff's printers, without alerting users.[2] *Id.* at ¶ 31. The update caused affected printers to cease functioning with certain third-party and refilled cartridges. *Id.* at ¶ 32. HP printers and compatible ink cartridges contain chips that allow the printer and the cartridge to communicate with each other. *Id.* at ¶ 74, p. 16.[3] The printer chip contains a master key code and the cartridge chip contains a base key code that allows the printer to authenticate that the cartridge is compatible. *Ibid.* The April firmware update changed the communication protocol between printer chips and cartridge chips so that certain varieties of non-HP cartridge chips were no longer able to communicate with the HP printers. *Id.* at ¶ 82, p. 18. Because the firmware update blocked these non-HP cartridge chips, any cartridge with such a chip no longer functioned with an HP printer. *Ibid.*

As a result of the update, Plaintiff's printer ceased working with the refilled cartridges that were installed in his printers at the time. *Id.* at ¶ 40. When Plaintiff attempted to print, he received a series of error messages stating that he needed to replace empty cartridges and that there was a "cartridge problem." *Id.* at ¶¶ 42-44. He replaced the refilled cartridges with other third-party cartridges and received another error message directing him to remove and reinstall the

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[2] Plaintiff alleges that the firmware update affected all HP Officejet Pro 7740 model printers as well as an extensive list of other printer models (the "Class Printers"). *See* FAC ¶ 67 for a complete list of Class Printers.

[3] The FAC's paragraphs are incorrectly numbered beginning after paragraph 90 on page 19. There are also two paragraphs numbered 59, and two paragraphs numbered 67. The Court refers to the paragraph number listed in the FAC with a page number where necessary for clarity.

cartridge to make sure it was correctly installed. *Id.* at ¶ 45. Plaintiff was not able to use his printers unless and until he bought HP brand cartridges. *Id.* at ¶ 32. At the time of the firmware update, Plaintiff had purchased and was in possession of at least nine refilled cartridges, which no longer functioned with his printer following the update. *Id.* at ¶ 33. As of the date the FAC was filed, Plaintiff's printers still did not work unless they were loaded with original HP cartridges. *Id.* at ¶ 83, p. 18. Plaintiff alleges that this limited functionality devalued his printers. *Id.* at ¶ 32.

Plaintiff alleges that HP has engaged in this type of conduct before. *Id.* at ¶ 84, p. 18. For example, firmware updates in March 2016 and September 2017 similarly altered the communication protocol between HP printers and certain non-HP cartridges. *Ibid.* One prior remote firmware update gave rise to a class action lawsuit filed in this Court involving very similar claims against HP. *See San Miguel v. HP Inc.*, 317 F. Supp. 3d 1075 (N.D. Cal. 2018). In *San Miguel*, this Court granted in part and denied in part HP's motion to dismiss the plaintiffs' claims. *Id.* Following the Court's order on the motion to dismiss, the parties reached a settlement by which HP agreed not to reinstall or reactivate Dynamic Security in the printers at issue in that case. FAC ¶ 70, p. 20. While the parties agree that HP has not violated the settlement agreement, Plaintiff alleges that HP has continued to engage in a pattern of pushing firmware updates in other printer models, including the Class Printers in this case. *Id.* at ¶¶ 71-72, p. 20.

Based on the foregoing, Plaintiff seeks to represent "[a]ll United States Citizens who, between the applicable statute of limitations and the present, purchased or owned one [or] more Class Printers" (the "Class") as well as "all persons in Florida who purchased or owned one or more Class Printers" (the "Florida Subclass"). *Id.* at ¶ 75, p. 21.

On behalf of the Florida Subclass, Plaintiff asserts claims for violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") (Claim 1) and the Florida Misleading Advertisement Law ("FMAL") (Claim 2). On behalf of the Class, Plaintiff asserts claims for violations of the Computer Fraud and Abuse Act ("CFAA") (Claim 3), trespass to chattels (Claim 4), and tortious interference with contractual relations and/or prospective economic advantage

(Claim 5).

HP now moves to dismiss all of Plaintiff's claims, asserting that HP is not under any legal duty to make its printers compatible with non-HP ink cartridges. Motion, p. 1. HP reasons that all of Plaintiff's claims start from the underlying and deficient premise that HP had some duty to make its printers compatible with non-HP ink cartridges, even those containing cloned security chips that infringe on HP's intellectual property. *Ibid.* HP argues that it was under no such legal obligation, did not make any misleading representations as to the compatibility of non-HP cartridges with its printers, and generally did nothing unlawful. *Ibid*

In his Opposition to HP's Motion (Dkt. No. 29, "Opposition"), Plaintiff represented that he would voluntarily withdraw his claim for tortious interference with contractual relations. Opp., p. 3. Therefore, the Court does not address HP's arguments for dismissal of Claim 5.

II. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) provides that a party may seek dismissal of a suit for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When deciding whether to grant a motion to dismiss, the court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014) (citation omitted). However, "courts are not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678. Dismissal "is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

III. Discussion

a. FDUTPA Claim

Plaintiff alleges that HP violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). Fla. Stat. §§ 501.201 et seq. FDUTPA prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.204(1). "A consumer claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *Rollins, Inc. v. Butland,* 951 So.2d 860, 869 (Fla. Dist. Ct. App. 2006), *review denied,* 962 So.2d 335 (Fla. 2007). "Whether an alleged act or practice is deceptive or unfair may be decided as a matter of law." *Casey v. Fla. Coastal Sch. of Law, Inc.*, No. 3:14-cv-1229-J-39PDB, 2015 WL 10096084, at *6 (M.D. Fla. Aug. 11, 2015), report and recommendation adopted, No. 3:14-cv-01229, 2015 WL 10818746 (M.D. Fla. Sept. 29, 2015); *see, e.g., P.C. Cellular, Inc. v. Sprint Solutions, Inc.,* No. 5:14-cv-237-RS-GRJ, 2015 WL 128070, at *5 (N.D. Fla. Jan. 8, 2015); *Zambrano v. Indian Creek Holding, LLC,* No. 09-cv-20453, 2009 WL 2365842, at *1 (S.D. Fla. July 30, 2009).

i. Rule 9(b)

Consumer-protection claims that sound in fraud are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003); *San Miguel*, 317 F. Supp. 3d at 1084. Rule 9(b) requires that "a party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). The circumstances constituting the fraud must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Therefore, a party alleging fraud must set forth "the who, what, when, where, and how" of the misconduct. *Vess*, 317 F.3d at 1106 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)).

Federal district courts are split as to whether FDUTPA claims are subject to the heightened pleading requirements of Rule 9(b). *Compare Costa v. Kerzner Int'l Resorts, Inc.*, No. 11-cv-

60663, 2011 WL 2519244, at *2 (S.D. Fla. June 23, 2011) (finding Rule 9(b) does not apply) *with Llado-Carreno v. Guidant Corp.*, No. 09-20971, 2011 WL 705403, at *5 (S.D. Fla. Feb. 22, 2011) (finding that Rule 9(b) does apply). "[W]here the gravamen of the [FDUTPA] claim sounds in fraud" the heightened pleading standard of Rule 9(b) applies. *State Farm Mut. Auto. Ins. Co. v. Performance Orthopaedics & Neurosurgery, LLC*, 278 F. Supp. 3d 1307, 1327-28 (S.D. Fla. 2017) (applying Rule 9(b) requirements to an FDUTPA claim where the "gravamen" of the complaint was that Defendants engaged in a "fraudulent scheme" to "grossly inflate[ ]" the value of their patients' personal injury claims so that plaintiff-insurer would "pay significant settlement amounts based upon false information.").

Courts have recognized, however, that "FDUTPA was enacted to provide remedies for conduct outside the reach of traditional common law torts like fraud, and thus plaintiffs need not prove the elements of fraud to sustain an action under FDUTPA." *See, e.g.*, *State of Fla., Office of Atty. Gen., Dept. of Legal Affairs v. Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288, 1310 (S.D. Fla. 2005) ("A deceptive or unfair trade practice constitutes a somewhat unique tortious act because, although it is similar to a claim of fraud, it is different in that, unlike fraud, a party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue.") (citation omitted); *Davis v. Powertel, Inc.*, 776 So. 2d 971, 974 (Fla. 1st DCA 2000) ("The plaintiff need not prove the elements of fraud to sustain an action under the statute.").

HP argues that Plaintiff's FDUTPA claim sounds in fraud because Plaintiff characterizes HP's alleged omissions with respect to the firmware update as "unfair and/or fraudulent" and constituting a "common scheme" undertaken to "mislead" and "deceive." *See* FAC ¶¶ 56, 87, 90. At its core, Plaintiff's FDUTPA claim is grounded in HP's allegedly misleading failure to disclose certain information to consumers in the course of business. The Court finds that despite the FAC's few references to fraudulent conduct, the "gravamen" of Plaintiff's FDUTPA claim does not sound in fraud. *See Harris v. Nordyne, LLC*, No. 14-cv-21884, 2014 WL 12516076, at *5 (S.D. Fla. Nov. 14, 2014) ("even where a FDUTPA claim includes allegations which implicate

fraudulent conduct, it need not meet the heightened pleading requirements of Rule 9(b)"). Therefore, Rule 9(b) pleading requirements do not apply to Plaintiff's FDUTPA claim. *See Id.* at *4 (holding that Rule 9(b) did not apply where FDUTPA claim was "grounded in an alleged deceptive omission by failure to disclose," reasoning that the heightened pleading requirement is not necessary to provide defendant adequate notice of an alleged omission).

ii. Deceptive Act

For purposes of a FDUTPA claim, deception occurs where there is a "representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *Westgate Resorts, Ltd. v. Sussman*, 387 F. Supp. 3d 1318, 1363 (M.D. Fla. 2019) (citing *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003)). This deception may be accomplished by innuendo and through omissions, rather than outright false statements. *State Farm Mutual Automobile Insurance Company v. Performance Orthopaedics & Neurosurgery*, LLC, 278 F.Supp.3d at 1327. To satisfy this element, "the plaintiff must show that the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances." *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 983-84 (11th Cir. 2016) (internal quotations and citations omitted).

Plaintiff argues that HP failed to disclose its "ability to lock out third-party cartridges or refilled cartridges with its firmware updates," (FAC ¶ 39) and that this omission constitutes a deceptive act under FDUTPA. *Id.* at ¶ 92. Plaintiff concedes that his claims are "not premised on affirmative misrepresentations, except insofar as Defendant made misleading statements which gave rise to a duty to disclose its deceptive conduct." Opp. p. 21, n. 8. Plaintiff alleges that three statements in particular gave rise to HP's duty to disclose its ability to prevent the use of non-HP cartridges: (1) a statement on the packaging of the printers Plaintiff purchased, which directed customers to "[p]lease use genuine HP ink cartridges for best results" (FAC ¶ 34); (2) an unspecific representation that "made Plaintiff believe that he could use 952-, 952XL, 953-, and 953XL ink cartridges, including third party ink cartridges" (*Id.* at ¶ 26); and (3) a statement on the

Support Page that "HP cannot guarantee the quality or reliability of non-HP cartridges" (FAC ¶ 38).[4] Plaintiff argues that these statements, when viewed together, misleadingly imply that consumers would be able to use non-HP cartridges with their HP printers in perpetuity, and that HP therefore had a duty to disclose the fact that a remote firmware update could render non-HP cartridges incompatible.

The Court agrees that the statement that HP ink produces "best results" implies that it is possible to use non-HP ink cartridges with the printer. The Court does not agree, however, that this implication is misleading to a reasonable customer. At the time Plaintiff purchased the printers, it *was* possible to use non-HP cartridges. *Id.* at ¶ 29. The statement on the box does not, on its face, imply that the printer is compatible with *all* non-HP cartridges, or that it would *always* be compatible with such cartridges. The statement, therefore, does not create a duty for HP to disabuse consumers of any such misconception.

The Support Page stated that "HP cannot guarantee the quality or reliability of non-HP cartridges." *Id.* at ¶ 38. Like the statement on the box, this statement implies that non-HP cartridges may be compatible with the printer; however, it does not make any representation that all non-HP cartridges will work or that those cartridges will continue to work in the future. In fact, it expressly warns that non-HP cartridges may not be reliable. In light of this express warning, no reasonable customer would understand HP's statement to mean that the printer would

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[4] While Plaintiff's allegations regarding HP's omissions focus on the information available at the "point of sale" (FAC ¶¶ 34, 92, 106), he relies on HP's statements on the Support Page to show that HP misled consumers into believing that non-HP cartridges were compatible. *Id.* at ¶¶ 37-40; Opp. p. 6, 23. Because Plaintiff alleges that the Support Page misled him regarding his ability to use non-HP cartridges, he must also acknowledge that information on the Support Page was available to him prior to purchase. Thus, the Court considers the information on the Support Page to be information available to Plaintiff prior to and at the time of purchase.

remain compatible with non-HP cartridges.

HP's alleged statements regarding "generic ink cartridge number[s]" are similarly not misleading. *See* Opp., p. 23. Plaintiff alleges that that "all of the printers previously purchase by Plaintiff allowed the use of third party ink cartridges," that "it was common industry practice" to allow the use of such cartridges. FAC ¶ 26. He then alleges that "[t]hese representations and omissions made Plaintiff believe that he could use 952-, 952XL, 953-, and 953XL- ink cartridges, including third party ink cartridges and refilled HP ink cartridges." *Ibid.* Plaintiff fails to identify what those "representations and omissions" were that caused him to believe that he could use particular generic cartridges. In the absence of any allegedly misleading representation, HP was under no duty to correct Plaintiff's misconception based on his knowledge of "industry practice" and his prior purchases. *See San Miguel*, 317 F. Supp. 3d at 1089 (finding no misrepresentation where HP included specific parts numbers on the printer box in the absence of any statement that would lead a reasonable consumer to believe the numbers were for generic parts).

Because none of the allegedly misleading statements gave rise to a duty to disclose additional information, the Court finds that Plaintiff's allegations as to HP's omissions are insufficient to state a claim under FDUTPA. *In re NJOY, Inc. Consumer Class Action Litig.*, No. 14-cv-00428-MMM, 2015 WL 12732461, at *14 (C.D. Cal. May 27, 2015) ("Where an FDUTPA claim is based on an omission, and the defendant had no duty to disclose the purportedly withheld information, the claim fails as a matter of law.") (citing *Virgilio v. Ryland Group, Inc.*, 680 F.3d 1329, 1338 (11th Cir. 2012)).

Moreover, the information that Plaintiff argues HP should have disclosed was in large part disclosed on the Support Page. Plaintiff alleges that HP misled him by not telling him "at the time of purchase that [his] HP Printer would at some time in the future reject the less expensive third party replacement ink cartridges." FAC ¶ 10. However, the Support Page expressly stated that the printer's firmware "includes dynamic security measures, which may prevent supplies with non-HP chips or circuitry from working now or in the future." *Id.* at ¶ 37. While HP did not disclose a

plan to distribute the firmware update at issue (and there are no allegations that HP had such a plan at the time of Plaintiff's purchases), the warning on the Support Page is sufficient to counter any potential misconception about the use of non-HP cartridges. *Casey*, 2015 WL 10096084, at *13 ("FDUTPA does not require companies to be wholly transparent . . . so long as the publication is not probably deceptive and likely to cause injury to a reasonably relying consumer."). It defies common sense to suggest that a reasonable customer would understand HP's assertion that non-HP cartridges may be prevented from working in the future to mean that non-HP cartridges would continue to work in perpetuity. *See Beale v. Biomet, Inc.*, 492 F. Supp. 2d 1360, 1374 (S.D. Fla. 2007) (rejecting FDUTPA claim where "the literature makes clear those very things that Plaintiffs complain were deceiving.").

The Court, therefore, finds that Plaintiff has failed to allege any representation or omission likely to deceive a reasonable customer sufficient to state a claim under FDUTPA.

iii. Unfair Practice

Plaintiff next argues that HP's conduct violates FDUTPA because it constitutes an unfair business practice. Fla. Stat. § 501.204. An act or practice is "unfair" for the purposes of FDUTPA if it causes consumer injury that is (1) substantial, (2) not outweighed by any countervailing benefits to consumers or competition, and (3) one that consumers themselves could not have reasonably avoided (the "Section 5 Test"). *Porsche Cars N. Am., Inc. v. Diamond*, 140 So. 3d 1090, 1096 (Fla. Dist. Ct. App. 2014) (adopting the FTC Policy Statement on Unfairness for the purposes of establishing unfairness under FDUTPA).[5] "[V]iolations of FDUTPA include

[5] Although courts applying FDUTPA have often defined an "unfair" act or practice as one that "offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," *see, e.g., PNR, Inc.,* 842 So.2d at 777, that definition appears to be outdated, *Porsche,* 140 So.3d at 1096; *Casey*, 2015 WL 10096084, at *6. Regardless, the difference in definition is immaterial to the Court's analysis here.

violations of '[t]he standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts.'" *Id.* at 1096–97 (quoting Fla. Stat. § 501.203(3)(b)); *see Fed. Trade Comm'n v. Vylah Tec, LLC*, No. 17-cv-228-PAM-MRM, 2019 WL 722085, at *6 (M.D. Fla. Jan. 9, 2019) (stating the requirements for a FDUTPA claim "mirror[] the requirements of Section 5 of the FTC Act"); *Casey*, 2015 WL 10096084, at *6 (M.D. Fla. Aug. 11, 2015) (same).

Plaintiff alleges that HP engaged in the following unfair practices in violation of FDUTPA:

- Defendant "misled Purchasers by intentionally omitting highly relevant material information from purchasers at the point of sale regarding future restrictions that HP would place on the use of Class Printers, namely a firmware update that would render incompatible any third party or refill ink cartridges with Class Printers" (FAC ¶ 92);
- Defendant "invaded Class Members' Class Printers without notice or authorization, and substantially decreased the value of the products, after the point of sale, by installing permanent firmware updates onto the units that rendered the units less functional and less valuable than they were prior to that time" (*Id.* at ¶ 93);
- Defendant "invaded Class Members' Class Printers without notice or authorization, and rendered existing third party and refill ink cartridges that Class Members had previously purchased and owned valueless to class members" (*Id.* at ¶ 94);
- Defendant "sold printers which were not advertised to disclose particular features and functions and forced modifications without consumers' consent" (*Id.* at ¶ 95);
- Defendant "harm[ed] . . . competition and raise[d] the cost of owning printers amongst consumers generally in the marketplace by artificially restricting free

> choice with respect to aftermarket products. This is accomplished by forcing existing customers who have sunk a high upfront cost in a printer (a barrier to entry for a consumer who wishes to purchase a competitor printer but is now stuck), and now are restricted to continuing to use that printer and HP brand ink cartridges at an artificially elevated variable cost due to barriers preventing them from altering their otherwise free choice. By tying a fixed base product (printers) to variable products (ink cartridges) in this way, when combined with undisclosed deceptive conduct of altering the base product without authorization, HP has harmed competition and consumers both generally, and specifically" (*Id.* at ¶ 96).

Plaintiff alleges that this conduct caused him to suffer injury including by rendering his printers unusable (*Id.* at ¶¶ 32, 33, 52, 57, 86, 93, 94, 100, 129, 134), by rendering his replacement cartridges useless (*Id.* ¶ 33), by forcing him to buy more expensive HP brand replacement ink cartridges (*Id.* at ¶¶ 32, 50), and by devaluing his printers (*Id.* at ¶¶ 32, 33, 52, 57, 86, 93, 94, 96, 100, 129, 134). Accepting these allegations as true, the Court finds that Plaintiff has sufficiently alleged a "substantial injury" under the first prong of the Section 5 Test. *Porsche*, 140 So. 3d at 1101 ("In most cases a substantial injury involves monetary harm, as when sellers coerce consumers into purchasing unwanted goods") (excerpting the FTC Policy Statement on Unfairness date Dec. 17, 2980).

With respect to the second prong of the Section 5 Test, HP argues that Plaintiff fails to raise any allegation that his injury is not outweighed by a countervailing benefit to consumers. Reply, p. 7. Plaintiff maintains that there is no countervailing benefit on the face of the FAC that justifies HP's conduct. Opp. p. 18. As HP points out, however, the Support Page, which is incorporated into the FAC, contains a number of reasons for the firmware updates that are allegedly beneficial to consumers and to competition. *See* Support Page, Dkt. No. 26-1 (the "process for authenticating cartridges" is to "protect the quality of [the] customer experience,

maintain the integrity of [HP's] printing systems, and protect [HP's] intellectual property."). Plaintiff raises no allegations to refute these alleged benefits, or to show that they are outweighed by the injury he suffered. Even accepting the allegations as true and construing them in the light most favorable to Plaintiff, the Court finds that Plaintiff fails to allege that his injury outweighs any countervailing benefit to consumers. *See Kindred Studio Illustration & Design, LLC v. Elec. Commc'n Tech.*, LLC, 2018 WL 6985317, at *7 (C.D. Cal. Dec. 3, 2018) (dismissing FTC Section 5 claim because conclusory allegation that alleged harm is "not outweighed by countervailing benefits to consumers or to competition" was insufficient).

The Court also finds that Plaintiff fails to allege that he could not have avoided the alleged injury as required to meet the third prong of the Section 5 Test. An injury is reasonably avoidable if consumers "have reason to anticipate the impending harm and the means to avoid it." *Orkin Exterm. Co., Inc. v. FTC,* 849 F.2d 1354, 1365-66 (11th Cir.1988). As discussed in Part III(a)(i) above, the Support Page gave consumers notice that non-HP cartridges may not work with HP printers in the future. This information is sufficient to allow a reasonable consumer to anticipate any impending harm caused by a printer with limited compatibility with non-HP cartridges. Consumers had the means to avoid any impending injury, either by buying a different printer in the first instance, or by not buying refilled or third-party cartridges that might be rendered incompatible in the future. *Casey*, 2015 WL 10096084, at *15 (finding that consumers could have reasonably avoided injury caused by misleading representations and omissions where sources providing accurate information were available to consumers).

Plaintiff does not allege facts sufficient to meet the second or third prongs of the Section 5 Test, and is thus unable to state a claim under FDUTPA based on unfair practices. Because the Court finds that Plaintiff's allegations are insufficient to show that the HP's conduct was deceptive or unfair, the Court need not consider whether Plaintiff has adequately alleged causation or damages. Plaintiff's FDUTPA claim (Claim 1) is DISMISSED without prejudice.

b. FMAL Claim

Plaintiff alleges that HP violated the Florida Misleading Advertisement Law (the "FMAL"), which generally prohibits misleading advertising. FAC ¶¶ 103-11; Fla. Stat. § 817.41(1). Specifically, Plaintiff alleges that HP advertised its printers as "compatib[le] with third-party and refill ink cartridges" and that those advertisements were misleading in light of a future firmware update that rendered the printers incompatible with such cartridges. FAC ¶ 105.

In relevant part, the FMAL makes it "unlawful for any person to make or disseminate or cause to be made or disseminated before the general public of the state, or any portion thereof, any misleading advertisement." Fla. Stat. § 817.41(1). "A 'misleading advertisement' is defined as statements made with the purpose of selling property or services 'which are known, or through the exercise of reasonable care or investigation could or might have been ascertained, to be untrue or misleading.'" *Godelia v. Doe 1*, 881 F.3d 1309, 1321 (11th Cir. 2018) (quoting Fla. Stat. § 817.40(5). Under the FMAL, Plaintiff must "prove reliance on the alleged misleading advertising, as well as each of the other elements of the common law tort of fraud in the inducement." *Smith v. Mellon Bank*, 957 F.2d 856, 858 (11th Cir. 1992); *see also Makaeff v. Trump Univ.*, LLC, 145 F. Supp. 3d 962, 981-82 (S.D. Cal. 2015).

HP argues that Plaintiff has failed to identify any misleading advertisement, noting that the only advertisement mentioned in the FAC is the statement on the printer packaging that directed customers to "[p]lease use genuine HP ink cartridges for best results." Opp., p. 13; FAC ¶ 34. HP further argues that Plaintiff failed to meet any of the elements of fraudulent inducement, as required to state a claim under the FMAL.

As with his FDUTPA claim, Plaintiff argues that his FMAL claim is based on omissions, not affirmative representations. Opp. p. 21. The Court finds that the alleged representations and omissions are not "untrue or misleading" under the FMAL for the same reasons that those representations and omissions are not deceptive or unfair under the FDUTPA, as discussed above. *See Cross v. Point & Pay, LLC*, 274 F. Supp. 3d 1289, 1297 (M.D. Fla. 2017) ("The type of activity proscribed by section 817.41—misleading advertising—is precisely the type of unfair and

deceptive trade practice that is prohibited by FDUTPA."). Because Plaintiff has failed to allege any misleading advertising, his allegations are insufficient to state a claim under the FMAL and the Court need not consider whether he adequately alleged the elements of fraudulent inducement.

Plaintiff's FMAL claim (Claim 2) is DISMISSED without prejudice.

c. CFAA Claim

The Computer Fraud and Abuse Act ("CFAA") is a federal criminal statute that also authorizes civil actions for any person who suffers damage or loss by reason of a violation of the statute. 18 U.S.C. § 1030(g). "The CFAA prohibits a number of different computer crimes, the majority of which involve accessing computers without authorization or in excess of authorization, and then taking specified forbidden actions, ranging from obtaining information to damaging a computer or computer data." *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1135 (9th Cir. 2009) (citing 18 U.S.C. 1030(a)(1)-(7) (2004)).

Plaintiff alleges that HP violated Sections 1030(a)(5)(A) through (C), Section 1030(a)(2)(C), and Section 1030(a)(6)(A). In relevant part, Section 1030(a) creates liability for whomever:

> (5)(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;
>
> (5)(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage;
>
> (5)(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss;
>
> (2)(C) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer;
>
> (6)(A) knowingly and with intent to defraud traffics (as defined in [18 U.S.C.] section 1029) in any password or similar information through which a computer may be accessed

without authorization, if . . . such trafficking affects interstate or foreign commerce. 18 U.S.C. §§ 1030(a).

The phrase "without authorization" has been interpreted to mean "when the person has not received permission to use the computer for any purpose (such as when a hacker accesses someone's computer without any permission) or when the [computer owner] has rescinded permission to access the computer and the defendant uses the computer anyway." *Brekka*, 581 F.3d at 1135; *see Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1066 (9th Cir. 2016) (same).

Here, Plaintiff does not contest that HP had "authorized access" to Plaintiff's printers. (FAC ¶ 122), nor that HP had authorization to install firmware updates. *Id.* at ¶ 66 ("HP can communicate with HP printers after it sells them. One way to communicate with printers is by updating their software."). Plaintiff instead alleges that HP exceeded its authorized access when it conducted a remote firmware update for the purpose of limiting Class Printers' compatibility with certain non-HP cartridges. *Id.* at ¶¶ 122-23.

The statutory definition of "exceeds authorized access" is "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6). Allegations that HP exceeded authorized access are insufficient to state a claim under subsections (B) and (C), which only apply to conduct "without authorization." In *San Miguel*, this Court held that similar allegations were insufficient to state a claim under subsections (B) and (C). *San Miguel*, 317 F. Supp. 3d at 1085. This Court reasoned that expanding subsections (B) and (C) to include conduct that allegedly exceeded authorized access would not only be "contrary to the plain language of subsections (B) and (C), but also inconsistent with other provisions of the CFAA that expressly provide for liability when a defendant 'accesses a computer without authorization *or* exceeds authorized access.'" *Id.* (quoting 18 U.S.C. § 1030(a)(2)). This remains true in the present case.

Section 1030(a)(5)(A), however, does not require accessing a computer "without

authorization." Instead, subsection (A) provides liability for "knowingly caus[ing] the transmission of a program, information, code or command, and as a result of such conduct, intentionally caus[ing] damage without authorization, to a protected computer." 18 U.S.C. § 1030(a)(5)(A). HP argues that Plaintiff failed to identify any damage to his printer as a result of HP's conduct. Motion, p. 17. Plaintiff alleges that HP knowingly transmitted the firmware update and intentionally caused damage by altering his printers' functionality in a way that devalued the printers. FAC ¶¶ 32, 57, 100. At the pleading stage, these allegations are sufficient. *See San Miguel*, 317 F. Supp. 3d at 1085-86; *In re Apple & AT & TM Antitrust Litigation*, 596 F.Supp.2d 1288 (N.D. Cal. 2008) (denying motion to dismiss Section 1030(a)(5)(A) claim where plaintiffs alleged that they authorized software update but did not authorize the resulting damages to their iPhones).

As to Plaintiff's claim under Section 1030(a)(2)(C), HP argues that the claim fails because HP did not exceed its authorized access, and even if it did, Plaintiff has not alleged any "information" that HP "obtain[ed]" from doing so. The Court agrees. The only allegation in the FAC that speaks to HP obtaining information states: "[b]y exceeding its authorized access, HP obtained and altered Class Printers' information and data." FAC ¶ 123. The FAC does not state what information HP allegedly obtained. This "formulaic recitation of a cause of action's elements" is not sufficient to survive a motion to dismiss. *Twombly*, 550 U.S. at 555.

Plaintiff's claim under Section 1030(a)(6)(A) fails for similar reasons. HP argues that Plaintiff failed to allege that HP trafficked "in any password or similar information through which a computer may be accessed without authorization." 18 U.S.C. § 1030(a)(6)(A). "Traffic" in this statute means "transfer, or otherwise dispose of, to another, or obtain control of with intent to transfer or dispose of." 18 U.S.C. § 1029(e)(5). Plaintiff alleges that "[t]hrough its firmware update, HP knowingly and with intent to defraud transferred or disposed of information from the Class Printers, including printer-to-cartridge communications that function like passwords." FAC ¶ 127. Plaintiff does not allege how "printer-to-cartridge communications" function like

passwords. Plaintiff also fails to allege that any information was transferred or disposed of as a result of the firmware update, or that HP intended to transfer or dispose of any information. Plaintiff's allegations are insufficient to state a claim under Section 1030(a)(6)(A). *Iqbal*, 556 U.S. at 678 ("a complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'") (citing *Twombly*, 550 U.S. at 557).

To the extent it is premised on Sections 1030(a)(5)(B), 1030(a)(5)(C), 1030(a)(2)(C), and 1030(a)(6)(A), Plaintiff's CFAA claim is DISMISSED without prejudice.

d. Trespass to Chattels

"The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another." *Miller v. Nat'l Broad. Co.*, 187 Cal.App.3d 1463, 1480 (1986) (citations omitted). The California Supreme Court has held that the principles underlying the tort apply to allegations of digital trespass. *See Intel Corp. v. Hamidi*, 30 Cal.4th 1342 (2003). "[T]o prevail on a claim for trespass based on accessing a computer system, the plaintiff must establish: (1) defendant intentionally and without authorization interfered with plaintiff's possessory interest in the computer system; and (2) defendant's unauthorized use proximately resulted in damage to plaintiff." *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F.Supp.2d 1058, 1069-70 (N.D. Cal. 2000).

Plaintiff's trespass allegations mirror those relating to its CFAA claim. Plaintiff alleges that HP exceeded its authorized access to Plaintiff's printers when it activated a firmware update that disabled his printers. FAC ¶ 122-23. Plaintiff further alleges that HP's conduct caused damage "by preventing the Class Printers from operating, by impairing the condition of these printers, by reducing the value of these printers, and by depriving Plaintiff and Class members of the use of these printers and of their non-HP ink cartridges for a substantial period of time." *Id.* at ¶ 134. HP argues that because it had authorized access (*Id.* at ¶ 122), Plaintiff cannot claim that HP acted "without authorization" for the purposes of a trespass claim. Motion, p. 21.

In *San Miguel*, this Court held that similar allegations were sufficient to state a claim for digital trespass despite the fact that the defendant had allegedly only exceeded authorized

access. *San Miguel*, 317 F. Supp. 3d at 1088. The Court similarly finds the allegations here sufficient to state a claim. *See In re Apple & AT & TM Antitrust Litigation*, 596 F.Supp.2d at 1307 (plaintiff's consent to install software update did not foreclose a trespass claim based on damage caused by that update); *see also eBay*, 100 F.Supp.2d at 1070 (trespass claim cognizable because even if defendant's web crawlers were authorized to use eBay's system, the web crawlers exceeded the scope of any such consent when they began acting like robots by making repeated queries).

e. Injunctive Relief

HP contends that Plaintiff does not have standing to bring a claim for injunctive relief. Generally, to establish Constitutional standing under Article III, a plaintiff must show (1) a concrete and particularized injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). A plaintiff must demonstrate constitutional standing separately for each form of relief requested. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 185 (2000). "For injunctive relief, which is a prospective remedy, the threat of injury must be 'actual and imminent, not conjectural or hypothetical.'" *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 (9th Cir.), *cert. denied*, 139 S. Ct. 640 (2018) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). In other words, the "threatened injury must be certainly impending to constitute injury in fact" and "allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (internal quotation marks and alteration omitted). Past wrongs, though insufficient by themselves to grant standing, are "evidence bearing on whether there is a real and immediate threat of repeated injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (internal quotation marks omitted). Where standing is premised entirely on the threat of repeated injury, a plaintiff must show "a sufficient likelihood that he will again be wronged in a similar way." *Id.* at 111.

In *Davidson v. Kimberly-Clark Corp.*, the Ninth Circuit held that "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an actual and imminent, not conjectural or hypothetical threat of future harm. 889 F.3d at 969. The Ninth Circuit made clear that such a consumer must still "adequately alleged that she faces an imminent or actual threat of future harm" and that such injury is concrete and particularized. *Id.* at 971. In that case, the Ninth Circuit held that the plaintiff had standing for injunctive relief because she alleged that she desired to repurchase the product at issue in the future. *Id.* at 970 (distinguishing cases from the Seventh, Second, and Third Circuits because the plaintiffs in those cases did not "sufficiently allege their intention to repurchase the product at issue as [plaintiff] [did] here.").

HP argues that Plaintiff does not have standing to seek injunction relief because he failed to allege that he has any desire to repurchase an HP printer. Motion, p. 24-25. While Plaintiff does not allege that he desires to repurchase an HP printer, the Court does not find his failure to do so dispositive in this case. Plaintiff alleges that he still owns the printers at issue and that HP continues to use remote firmware updates to modify its printers in a way that has allegedly harmed Plaintiff in the past. FAC ¶¶ 71-72, 102. Moreover, Plaintiff raises claims not based on false advertising—for example, his trespass and CFAA claims—where the conduct complained of is capable of repetition without Plaintiff purchasing another printer. These allegations and claims distinguish Plaintiff's case from cases like *Davidson*, where the misconduct alleged could only threaten future harm if the plaintiff repurchased the product.

In this case, the threat of a future firmware update that could further modify Plaintiff's printers is sufficiently "concrete and particularized" to establish standing, even in the absence of any allegations as to Plaintiff's desire to purchase another printer. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), *as revised* (May 24, 2016). The injury is particularized because it would affect Plaintiff, as an owner of HP printers, in a "personal and individual" way. *Ibid.* Plaintiff's

alleged injury is also sufficiently concrete, considering that Plaintiff alleges a history of lawsuits based on similar misconduct by HP. *See id.* at 1549 (stating that in considering whether a harm is concrete, it is instructive to consider whether the harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in American courts).

The Court finds that Plaintiff has shown a sufficient likelihood that he will be wronged again in a similar way to establish standing for injunctive relief. HP's motion to strike Plaintiff's request for injunctive relief is DENIED.

IV. Conclusion

For the reasons set forth above, HP's motion to dismiss is GRANTED IN PART. Plaintiff's FDUTPA claim (Claim 1), FMAL claim (Claim 2), and CFAA claim (Claim 3) to the extent it is premised on 18 U.S.C. §§ 1030(a)(5)(B), 1030(a)(5)(C), 1030(a)(2)(C), and 1030(a)(6)(A) are DISMISSED WITH LEAVE TO AMEND. HP's motion to dismiss is DENIED in all other respects. HP's motion to strike Plaintiff's request for injunctive relief is DENIED. Plaintiff may file and serve an amended complaint consistent with this Order no later than May 22, 2020.

IT IS SO ORDERED.

Dated: April 24, 2020

EDWARD J. DAVILA
United States District Judge